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No. 05-11304

In the Supreme Court of the United States

LAROYCE LATHAIR SMITH, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court of Criminal Appeals correctly determined that a *Penry* error can be subject to harmless-error review.

2. If so, whether the Court of Criminal Appeals properly applied a state-law harmless-error standard to determine whether the *Penry* error in this case warranted relief under state habeas law.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

This case raises important questions, not only about the propriety of harmless-error review of jury instruction errors in state criminal proceedings, but ultimately about the States' authority to set the terms and conditions on which their own courts may award post-conviction remedies created by state law. The arguments advanced by the petitioner and his *amici*, if accepted by this Court, would severely curtail the States' authority over their own, state-created post-conviction review proceedings.

On the narrower question of harmless-error review, this Court "has recognized on numerous occasions, [that] some constitutional errors do not entitle the defendant to relief, particularly habeas relief." *Calderon* v. *Coleman*, 525 U.S. 141, 147 (1998). Indeed, "most constitutional errors can be harmless," and the Court has made clear that application of harmless-error review to constitutional violations "is essential to preserve the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Arizona* v. *Fulminante*, 499 U.S. 279, 306, 308 (1991). Consistent with these principles, this Court has exempted from harmless-error analysis only a limited class of violations—those that constitute "structural defect[s] affecting the framework within which the trial proceeds, rather than simply * * * error[s] in the trial process itself." *Id.* at 310.

Like other instructional errors, an instruction that violates this Court's decision in *Penry* v. *Johnson*, 532 U.S. 782 (2001) (*Penry II*), is not such a "structural" error. Indeed, this Court has consistently held that erroneous jury instructions are subject to harmless-error analysis. See, *e.g.*, *Clemons* v. *Mississippi*, 494 U.S. 738 (1990); *Carella* v. *California*, 491 U.S. 263 (1989) (*per curiam*); *Pope* v. *Illinois*, 481 U.S. 497 (1987); *Rose* v. *Clark*, 478 U.S. 570 (1986). Even a jury instruction that omits a necessary element of the offense is subject to harmless-error review, because such an instruction "does not *necessarily* render a

criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder* v. *United States*, 527 U.S. 1, 9 (1999).

Amici have a significant interest in preserving the availability of harmless-error review for sentencing instructions. Although different States employ different harmless-error doctrines, all of the *amici* believe that harmless-error review is an important and effective means to distinguish immaterial, technical violations in criminal proceedings from violations that undermine public confidence in the conviction or the sentence. *Amici* thus agree with respondent that a *Penry* error, like other jury instruction errors, is not a structural error and thus should be subject to harmless-error review.

Amici also have a strong interest in preserving the States' prerogatives to make state-authorized post-conviction relief available on terms that the States deem appropriate. While the federal Constitution gives a criminal defendant certain rights at trial and sentencing, "[n]othing in the Constitution requires the States to provide [post-conviction] proceedings." *Murray* v. *Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring); accord *Pennsylvania* v. *Finley*, 481 U.S. 551, 557 (1987). Indeed, the States have "wide discretion to select appropriate solutions" in the administration of their criminal justice systems. *Murray*, 492 U.S. at 14 (Kennedy, J., concurring). Accordingly, once a State has elected to make post-conviction relief available to criminal defendants, the State should be free to apply its own legal doctrines, consistent with due process, in addressing requests for such relief.

In short, where a prisoner seeks an order from a *state court* relieving him from incarceration on a *state criminal judgment*, *state law* should ordinarily determine the availability of that remedy. For this reason, *amici* agree with respondent that a state court may apply its own harmless-error standard in determining whether to award discre-

tionary state post-conviction relief, even if that standard may differ from the harmless-error standard that would apply in a federal habeas proceeding challenging a similar error.

STATEMENT

Fifteen years and six appeals ago, a jury convicted petitioner LaRoyce Smith of capital murder.

1. During the guilt phase of Smith's trial, the jury heard evidence establishing that Smith told two friends that he intended to rob the local Taco Bell. Smith and his friends stopped at another friend's house to get a gun, and Smith announced they were "going to hit T.B." Smith knew that 19-year-old Jennifer Soto, the shift manager, would be working at Taco Bell that night. He told one of his friends, "If she see[s] my face, I will have to kill her." *Ex parte Smith*, 185 S.W.3d 455, 457 (Tex. Crim. App. 2006).

When Smith and the others arrived at the Taco Bell, they paced outside the building for 45 minutes waiting for Soto to leave the building. According to one witness, when "things didn't go right," they all got back in the car and started to leave. But Smith was insistent, saying, "No, man, it got to be done. It got to be done." So they returned to the Taco Bell. *Ibid.*

Smith knocked on the front door and asked to use the telephone. Another employee replied that the restaurant was closed and Smith could not come in. Smith asked to see Soto. She came to the door and agreed to let Smith and two others in to use the phone. Smith hugged Soto as he entered the restaurant. 185 S.W.3d at 457-458.

After pretending to make a phone call, Smith told Soto's co-worker that "they were going to rob the place." Then Smith walked back to the office where Soto was completing her paperwork for the day. The coworker testified that he heard yelling from the office and then saw Smith holding Soto in a headlock. He was pistol-whipping her on

the head with the butt of his gun, so furiously that the handle of the gun fell off. Smith demanded to know the combination to the safe, but Soto said she did not know it. Smith paused, took a step back, and shot Soto in the back at point-blank range. Soto cried, "God, please don't let me die." *Id.* at 458.

Smith was not finished. After taking a butcher knife from the kitchen, he asked again for the combination to the safe. Again, Soto said she did not know the combination. So Smith stabbed her under her left breast, then again in her thigh, abdomen, and head. Finally, Smith "sliced her neck, severing the jugular vein." Soto died, and Smith walked out of the Taco Bell with his friends. *Ibid.*

At trial, Smith portrayed himself as an innocent bystander. He said it was one of his friends, not he, who shot and fatally stabbed Soto. In fact, Smith said, he was a "Good Samaritan" who wrested the knife from the real killer's hands. Smith told the jury he knew Soto and liked her, and he thought "no one should die the way she did." The jury believed the State's witnesses, not Smith, and convicted him of murder. 185 S.W.3d at 458-459.

2. During the penalty phase, the State presented evidence showing that Smith beat another man with a baseball bat and threatened to kill him just two days after murdering Soto. The State also showed that police officers had found ten baggies of crack cocaine in Smith's possession when they picked him up on outstanding warrants just two months before the murder. Other witnesses testified that Smith had caused problems at school, threatening teachers and perhaps carrying weapons. *Id.* at 459.

In response to the State's evidence, Smith presented 19 witnesses to support his mitigation case. Of those, fifteen character witnesses testified that Smith was a respectful, churchgoing young man who had a limited mental capacity and suffered the effects of a tragic family life. *Id.* at 459-461. According to these witnesses, Smith was not violent and encouraged his younger relatives not to make the

same mistakes he had made. Smith's witnesses also testified that he had gone to work at age fifteen or sixteen to provide for his family because his father had a drug problem and sometimes stole from them. Smith's mother told the jury she believed her son was "a good child" who could not have hurt Soto. *Id.* at 461. Finally, Smith's pastor added that Smith showed remorse about Soto's death, was capable of rehabilitation, and would not be a future danger to society. *Id.* at 459-460.

Pursuant to Texas' capital punishment statute, the trial court instructed the jury that a death sentence would be warranted only if the jury gave affirmative answers to two "special issues": (1) the murder was deliberate and (2) the defendant posed a continuing danger to others. In light of this Court's decision in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*Penry I*),[1] the trial court further instructed the jury as follows: "You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty." *Ex parte Smith*, 132 S.W.3d 407, 409 (Tex. Crim. App. 2004).

Finally, the trial court gave what has come to be known as a "nullification" instruction—that if they believed a death sentence was not warranted by the facts of the case, they should "answer at least one of the Special Issues 'No' in order to give effect to your belief that the

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[1] The Court in *Penry I* held that Texas' capital sentencing scheme was constitutional on its face but might not always provide the sentencer with a sufficient opportunity to "consider and give effect to [mitigating] evidence." 492 U.S. at 319. The Court suggested, however, that this potential problem could be remedied by "instructions informing the jury that it could consider and give effect to the mitigating evidence." *Id.* at 328.

death penalty should not be imposed due to the mitigating evidence presented to you." *Ibid.* Smith did not object to the trial court's jury instructions. 185 S.W.3d at 461. The jury answered both special issues in the affirmative, and the trial court imposed a sentence of death. *Id.* at 462.

3. On direct appeal, Smith argued that the capital sentencing statute was unconstitutional under *Penry I* because it did not allow the jury to give full effect to his mitigating evidence. The Court of Criminal Appeals rejected this argument., *Smith* v. *State*, No. 71,333 (Tex. Crim. App. June 22, 1994) (unpublished). This Court denied certiorari. *Smith* v. *Texas*, 514 U.S. 1112 (1995).

Smith then filed his first application for a writ of habeas corpus, which the Court of Criminal Appeals denied as untimely. *Ex parte Smith*, 977 S.W.2d 610 (Tex. Crim. App. 1998). Again, this Court denied certiorari. *Smith* v. *Texas*, 525 U.S. 1148 (1999).

The Court of Criminal Appeals later allowed Smith to file a second application for a writ of habeas corpus. In that application, Smith argued that the trial court's "nullification instruction" was inadequate under *Penry II*, which held that a similar instruction in another Texas capital case did not allow jurors to give effect to mitigating evidence. The Court of Criminal Appeals denied habeas relief on the grounds that (1) Smith's mitigating evidence was not the type of evidence that this Court considered in *Penry II*, and (2) in any event, the trial court's "nullification instruction" cured any *Penry* problem. 132 S.W.3d at 408-409.

4. Several months later, this Court decided *Tennard* v. *Dretke*, 542 U.S. 274 (2004), holding that the rule of *Penry II* applies to any evidence that has any tendency to mitigate the sentence. Applying that new decision, this Court reversed the Court of Criminal Appeals' decision denying habeas relief and remanded the case for further proceedings. *Smith* v. *Texas*, 543 U.S. 37 (2004) (*per curiam*). The Court rejected the Court of Criminal Appeals' conclu-

sion that Smith was not entitled to relief where he had not shown "any link or nexus" between his low intelligence or his family background and the murder. *Id.* at 43-45. Turning to the "nullification instruction," the Court concluded that "[t]here is no principled distinction, for Eighth Amendment purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. Petitioner's evidence was relevant mitigation evidence for the jury under *Tennard* and *Penry I*. We therefore hold that the nullification instruction was constitutionally inadequate under *Penry II*." Accordingly, the Court reversed the judgment of the Texas Court of Criminal Appeals and remanded the case "for further proceedings not inconsistent with this opinion." *Id.* at 48-49.

5. On remand, the Court of Criminal Appeals followed this Court's decision in *Smith* and assumed that "at least some of [Smith's] evidence was not fully encompassed by the two special issues." 185 S.W.3d at 467. Thus, the court began from the premise that "the jury charge in this case *was constitutionally deficient* under *Penry II*." *Ibid.* (emphasis added).

The court then followed the "usual method" under Texas law for assessing the impact of an error in jury instruction (185 S.W.3d at 463), a method articulated in *Almanza* v. *State*, 686 S.W.2d 157 (Tex. Crim. App. 1984). Under the *Almanza* standard, which had previously been held to apply on collateral review, the court was required to determine whether the error in the jury instruction resulted in "actual, not just theoretical, harm to the accused." 185 S.W.3d at 463-464. Moreover, where the defendant did not object to the jury instruction when it was given, the appropriate inquiry is whether "the error caused him such *egregious* harm that he did not have a fair and impartial trial." *Id.* at 464 (quotations omitted) (emphasis added).

Applying these standards, and considering the conduct of the entire trial, the Court of Criminal Appeals found the

Penry error harmless. "All of [Smith's] mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment. We therefore conclude that [Smith] has failed to show, by a preponderance of the evidence, that the unobjected-to nullification instruction caused him 'egregious harm.'" *Id.* at 472.

SUMMARY OF ARGUMENT

The decision of the Court of Criminal Appeals should be affirmed, both on the merits, and because affirmance is necessary to preserve the States' proper authority over their own post-conviction review proceedings.

I. Constitutional errors in criminal proceedings are not automatically reversible, but are subject to harmless-error analysis unless they are "structural errors" that undermine the integrity of the entire trial. *Arizona* v. *Fulminante*, 499 U.S. 279 (1991). As this Court's decisions make clear, jury instruction errors typically are not "structural errors" and thus are subject to harmless-error review. *E.g.*, *Neder* v. *United States*, 527 U.S. 1 (1999); *Clemons* v. *Mississippi*, 494 U.S. 738 (1990); *Rose* v. *Clark*, 478 U.S. 570 (1986).

Moreover, *Penry* errors are no less amenable to harmless-error analysis than other kinds of jury instruction errors that this Court has considered. Because this Court's decisions in *Penry* and *Smith* did not foreclose the application of harmless-error review on remand, it was neither unlawful nor unreasonable for the Court of Criminal Appeals to determine whether the *Penry* error identified by this Court was harmless.

II. The Court of Criminal Appeals also acted properly in applying a state-law harmless-error standard to the erroneous jury instruction in this case. The Constitution does not require States to provide post-conviction remedies

at all. *United States* v. *MacCollom*, 426 U.S. 317 (1976) (plurality opinion). And when States choose to make such remedies available, they have wide latitude to determine the circumstances in which their own courts may award relief. *Murray* v. *Giarratano*, 492 U.S. 1 (1989); *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987).

Accordingly, state courts are not required to apply the same harmless-error standards in state post-conviction proceedings that federal courts apply in federal habeas proceedings. And for that reason, it was not error for the Court of Criminal Appeals to apply the settled Texas standard in determining whether the error previously identified by this Court was harmless.

ARGUMENT

I. The Court Below Correctly Determined That *Penry* Errors, Like Other Jury Instruction Errors, Are Subject To Harmless-Error Analysis.

Consistent with this Court's decision in *Smith* v. *Texas*, the Court of Criminal Appeals on remand started from the premise that the trial court's jury instructions were unconstitutional. The court then applied ordinary harmless-error standards to determine whether the erroneous jury instructions actually prejudiced Smith. This analysis was entirely appropriate, because *Penry* errors, like other jury instruction errors, are the kinds of "trial errors" that this Court has found susceptible to harmless-error review.

A. This Court has consistently held that jury instruction errors are subject to harmless-error review.

It is well settled that not all constitutional errors require a remedy. As this Court has made clear, "a constitutional error does not automatically require reversal of a conviction," and indeed "*most* constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). "[I]f the defendant had counsel and was tried by

an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). This presumption follows from the premise that the Constitution entitles a criminal defendant to a trial that is fair, not perfect. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986).

As this Court explained in *Fulminante*, the "common thread" among the cases in which the Court has applied harmless-error analysis is that "each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." 499 U.S. at 307-308. Such "trial errors" are distinguished from "structural defects in the constitution of the trial mechanism"—errors that "affect[] the framework within which the trial proceeds." *Id.* at 309-310. "Structural defects" include such fundamental errors as a complete deprivation of counsel at trial, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and participation of a biased trial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927).[2] The Court has emphasized that the automatic-reversal rule for "structural error" applies to only a "very limited class of cases." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997); see also *Rose*, 478 U.S. at 579 ("while there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule").

Jury instruction errors typically are not among this "limited class" of "structural errors." To the contrary, this Court has consistently held that constitutional errors in

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[2] Other examples include denial of self-representation at trial, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); denial of a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984); racial discrimination in the selection of the grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); and use of a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

jury instructions are "trial errors" subject to harmless-error review. See, *e.g.*, *Washington* v. *Recuenco*, 126 S. Ct. 2546, 2553 (2006) (failure to submit a sentencing factor to the jury); *Neder* v. *United States*, 527 U.S. 1, 4 (1999) (jury instruction omitted an essential element of the offense); *Calderon* v. *Coleman* 525 U.S. 141, 145 (1998) (*per curiam*) (jury instruction overstated the governor's authority to commute a death sentence); *Clemons* v. *Mississippi*, 494 U.S. 738, 752-754 (1990) (jury instruction included overbroad definition of aggravating factors for purposes of capital sentencing); *Carella* v. *California*, 491 U.S. 263, 266 (1989) (*per curiam*) (jury instruction imposed conclusive presumptions as to essential elements of the crime); *Pope* v. *Illinois*, 481 U.S. 497, 501-504 (1987) (jury instruction improperly stated that obscenity should be judged according to community standards); *Rose*, 478 U.S. at 584 (jury instruction improperly stated that the jury could presume malice in a murder case).

In only one case has this Court held that a jury instruction constituted "structural error"—*Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). In that case, the trial court gave an instruction that allowed the jury to convict the defendant based on proof that did not meet the "reasonable doubt" standard. *Id.* at 277. This error required automatic reversal because, the Court explained, there was no constitutional verdict to which harmless-error analysis could be applied. "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Id.* at 280. The Court made clear, however, that "[i]nsofar as the possibility of harmless-error review is concerned, the jury-instruction error in this case is quite different" from other instruction errors that are subject to harmless-error analysis. *Ibid.*

Thus, under this Court's decisions, an erroneous jury instruction does not infect the entire proceeding in a way that requires automatic reversal—so long as the jury con-

victed the defendant under the proper reasonable-doubt standard. Like other "trial errors," an inappropriate jury instruction (as long as it does not misstate the ultimate burden of proof) can be "quantitatively assessed in the context of other evidence presented." *Fulminante*, 499 U.S. at 308. On direct or collateral review, a court can evaluate the actual effect of an unconstitutional jury instruction in light of the conduct of the entire trial, including all the evidence, the arguments of counsel, and other instructions given to the jury.

B. *Penry* errors should be treated the same as other jury instruction errors and subject to harmless-error review.

Penry errors, moreover, may be harmless just as other jury instruction errors may be harmless. Indeed, *Penry* errors are no more "structural" than other instruction errors that this Court has found susceptible to harmless-error analysis. And this Court has recognized that other Eighth Amendment sentencing errors may be harmless, as illustrated by the circumstances of this case.

1. On several occasions, this Court has held that jury instruction errors bearing on ultimate issues were nevertheless subject to harmless-error analysis. For example, this Court in *Neder* upheld a conviction on various fraud charges, based on harmless-error analysis, even though the trial court instructed the jury that it "need not consider" the materiality of any false statements made by the defendant. 527 U.S. at 6, 19-20. Although it was clearly unconstitutional for the trial court to withhold the materiality issue from the jury, see *United States* v. *Gaudin*, 515 U.S. 506 (1995), the Court concluded that the jury instruction was subject to harmless-error analysis: "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. Where

the defendant "was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel" and "a fairly selected, impartial jury was instructed to consider all of the evidence and argument" relevant to his defense, the Court could not say that the jury instruction error alone rendered his trial "fundamentally unfair." *Ibid.*

Similarly, the Court in *Rose* v. *Clark* concluded that it was appropriate to apply harmless-error analysis where the trial court impermissibly shifted the burden of proof on whether the defendant had acted with malice in committing two murders. 478 U.S. at 574. The trial court instructed the jury that "[a]ll homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption." *Ibid.* Even though this instruction effectively relieved the prosecutor of his burden to prove malice, this Court explained that "[r]espondent received a full opportunity to put on evidence and make argument to support his claim of innocence. He was tried by a fairly selected, impartial jury, supervised by an impartial judge. Apart from the challenged malice instruction, the jury in this case was clearly instructed that it had to find respondent guilty beyond a reasonable doubt as to every element." 478 U.S. at 579-580. "Placed in context," the Court concluded, "the erroneous malice instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction." *Id.* at 579.

Neder and *Rose* thus demonstrate that even jury instructions that effectively relieve the government of its burden of proof—a fundamental constitutional requirement that shapes the entire criminal proceeding—are not "structural errors" that require automatic reversal.

This Court's decision in *Clemons* v. *Mississippi* further confirms that an instruction that inappropriately defines factors to be considered in a sentencing proceeding is not a "structural error." The Court there held that the trial

court erred in instructing the sentencing jury that it could consider, as an aggravating factor, whether the murder was "especially heinous, atrocious, or cruel." 494 U.S. at 742. Although this formulation had been rejected as unconstitutionally vague (*Maynard* v. *Cartwright*, 486 U.S. 356 (1988)), this Court held that "it was open to the Mississippi Supreme Court to find that the error which occurred during the sentencing proceeding was harmless." 494 U.S. at 752.

If, as this Court has held, "most constitutional errors can be harmless" (*Fulminante*, 499 U.S. at 306), and if the jury instruction errors at issue in *Neder*, *Rose*, and *Clemons* could be harmless, then a *Penry* error likewise can be harmless.

2. This Court's Eighth Amendment sentencing decisions point to the same conclusion. *Penry I* represents an application of this Court's holdings in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982). As the Court explained in *Penry I*, "at the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." 492 U.S. at 318.

Yet *Lockett* and *Eddings* errors are subject to harmless-error review. For example, this Court in *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), found an Eighth Amendment violation under *Lockett* and *Eddings* where the trial court instructed an advisory jury not to consider certain mitigating evidence. *Id.* at 399. But the Court further explained: "Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. *In the absence of such a showing* our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid."

Ibid. (emphasis added). Thus, where the State *can* show that a jury instruction improperly restricting consideration of mitigating evidence was harmless, the sentence need not be disturbed.[3]

Given that *Penry I* simply followed the rules announced in *Lockett* and *Eddings*, and that *Lockett* and *Eddings* errors are subject to harmless-error review, *Penry* errors likewise must be subject to harmless-error review.

3. The circumstances in this case illustrate the reasonableness of applying harmless-error analysis to *Penry* errors. Nothing in the record here suggests that petitioner was deprived of a fair trial. He was adequately represented by counsel before an unbiased judge and a properly selected jury. He was permitted during the penalty phase to present all the mitigating evidence he wanted the jury to consider. Indeed, Smith presented 19 different mitigation witnesses, including 15 character witnesses. None of petitioner's mitigation evidence was excluded. The trial court instructed jurors that they "shall consider any evidence which, in your opinion, is mitigating," thus making clear that jurors were *required* to decide whether they thought petitioner's evidence was, in fact, mitigating and

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[3] State courts likewise have concluded that Eighth Amendment sentencing errors are subject to harmless-error analysis. *E.g.*, *Doorbal* v. *State*, 837 So. 2d 940, 959-960 (Fla. 2003) (finding a *Lockett* error harmless); *People* v. *Davis*, 706 N.E.2d 473, 488 (Ill. 1998) (following *Hitchcock* and holding that an *Eddings* error was not harmless); *State* v. *Daughtry*, 459 S.E.2d 747, 766 (N.C. 1995) (finding a *Lockett* error harmless); *Bryson* v. *State*, 876 P.2d 240, 256-257 (Okla. Crim. App. 1994) (finding an *Eddings* error harmless); *People* v. *Robertson*, 767 P.2d 1109, 1130 (Cal. 1989) (*en banc*) (citing *Hitchcock* and holding that an *Eddings* error was harmless); *People* v. *Hamilton*, 756 P.2d 1348, 1362 (Cal. 1988) (*en banc*) (citing *Hitchcock* and finding an *Eddings* error harmless); *State* v. *Eaton*, 524 So. 2d 1194, 1206 (La. 1988) (following *Hitchcock* and holding that an *Eddings* error was harmless).

if it was, whether that evidence warranted a penalty less severe than death.[4]

Given all these circumstances, it is at least possible—indeed, it is *likely*—that the *Penry* error here did not affect the jury's verdict. Jurors either did not believe petitioner's evidence was mitigating, or they believed it was mitigating but not sufficiently so to warrant a lesser sentence. Given the fact that the evidence plainly supported affirmative responses to the special issues—and thus a death sentence—there is no reason to suspect that jurors actually imposed a death sentence believing that sentence was too severe.

In sum, it cannot be said that the error in this case—instructing the jury that it should answer "No" to one or both of the special issues if it wished to impose a sentence less than death—necessarily infected "[t]he entire conduct of the trial from beginning to end" and resulted in a sentencing proceeding that was unfair to petitioner. *Fulminante*, 499 U.S. at 310. Accordingly, consistent with this Court's jury-instruction decisions from *Rose* to *Neder*, the court below treated that *Penry* error as a "trial error" susceptible to harmless-error review. That analysis was entirely appropriate, because a *Penry* error need not *necessarily* cause an unfair result.

II. The Court Below Was Constitutionally Permitted To Determine That State Habeas Relief Was Not Warranted Where The *Penry* Error Was Harmless Under The State Harmless-Error Standard.

Given that the court below correctly concluded that the *Penry* error committed in petitioner's trial was not a structural error, the court was free to deny *state* habeas relief

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[4] Indeed, this Court in *Penry I* stated that the deficiency in the special issues could be remedied by "instructions informing the jury that it could consider and give effect to the mitigating evidence." 492 U.S. at 328. The trial court's instruction here was even stronger.

on that basis. As we now show, the States have broad discretion to determine the circumstances in which post-conviction relief may be awarded, and are not required to apply federal harmless-error standards in those proceedings. The Court of Criminal Appeals acted well within its discretion in applying Texas' harmless-error standard to the constitutional error in this case.

A. States that provide post-conviction remedies have broad discretion to determine when such remedies should be awarded.

This Court has made clear that the Constitution "does not establish any right to an appeal, and certainly does not establish any right to collaterally attack a final judgment of conviction." *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion) (citations omitted). In the context of direct appeals, this Court has recognized that "whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself." *McKane* v. *Durston*, 153 U.S. 684, 688 (1894). That is no less true in the context of collateral proceedings.

This Court has expressly recognized that States have broad discretion in providing post-conviction relief. For example, this Court held in *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987), that a State need not provide counsel for a prisoner seeking post-conviction relief from the State's courts. Although the Constitution guarantees the assistance of counsel through the first appeal as of right, it makes no such guarantee in the context of post-conviction proceedings—because the nature of post-conviction relief is fundamentally different from direct appellate review. As the Court explained, "[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of

his conviction." *Id.* at 556-557 (citation omitted). The States "have no obligation" to provide post-conviction relief, "and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State provide a lawyer as well. *Id.* at 557.

This holding reflects the Court's consistent view that the Constitution has little to say about the manner in which a State makes discretionary post-conviction relief available to its prisoners. Specifically, in *Finley* this Court was "unwilling to accept" the defendant's argument "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." *Id.* at 559. "On the contrary," the Court explained, "in this area States have *substantial discretion* to develop and implement programs to aid prisoners seeking to secure post-conviction review." *Ibid.* (emphasis added).

Applying *Finley* to capital cases, moreover, this Court has observed that "[s]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989). As Justice O'Connor explained in a concurring opinion, "[a] post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings, nor does * * * the Constitution require[ ] the States to follow any particular federal model in those proceedings." *Id.* at 13 (O'Connor, J., concurring) (citation omitted). Indeed, this Court has made clear that it "do[es] not question the State's power, in post-conviction proceedings, to reallocate the respective burdens of the individual and the State and to delimit the scope of state appellate review." *Drope* v. *Missouri*, 420 U.S. 162, 174 (1975).

In sum, state post-conviction proceedings are not and need not be subject to constitutional requirements to the same extent that direct appeals are, for the States have "wide discretion to select appropriate solutions" in criminal justice matters. *Murray*, 492 U.S. at 14 (Kennedy, J., concurring) (citation and quotations omitted). Beyond minimal due process requirements, the Constitution simply does not "dictate[ ] the exact form" that a state post-conviction proceeding must take (*Finley*, 481 U.S. at 559), including the standards of review applied by state courts.

B. In their post-conviction proceedings, States are constitutionally permitted to apply, and often do apply, harmless-error standards that differ from the relevant federal standards.

The States' discretionary authority over their own post-conviction procedures and remedies logically extends to determining whether to use harmless-error review in those proceedings and, if so, which harmless-error standard to employ.

1. For example, just as federal courts apply different harmless-error standards on direct review than on collateral review, state courts must also be permitted to make the same distinction. On direct review, a federal court must apply the standard described in *Chapman* v. *California*, asking whether the government has shown that any constitutional error was "harmless beyond a reasonable doubt." 386 U.S. 18, 24 (1967). This standard does not apply, however, on habeas review. In that context, a federal court applies the standard described in *Brecht* v. *Abrahamson*, and asks whether the prisoner has shown that the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. 619, 637-638 (1993).

Brecht itself illustrates the difference. In *Brecht*, the defendant testified at his murder trial that the shooting of his brother-in-law was accidental. *Id.* at 624. In response, the prosecutor pointed out to the jury several times that

Brecht had never made such a claim before trial. *Id.* at 624-625. The jury convicted Brecht and sentenced him to life imprisonment. *Id.* at 625. After exhausting his direct appeals, Brecht petitioned for a writ of habeas corpus, claiming that the prosecutor's comments had violated his Fifth Amendment right to remain silent, as defined by *Doyle* v. *Ohio*, 426 U.S. 610 (1976).

The question presented to this Court was whether the *Chapman* harmless-error standard applies to a *Doyle* violation on collateral review. This Court held that *Chapman* does not apply. Central to the Court's holding was the unremarkable proposition that "collateral review is different from direct review." 507 U.S. at 633. "When the process of direct review * * * comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Ibid.* (quotations omitted). Because collateral review seeks only to ensure that convictions do not violate "fundamental fairness," the rule is settled that "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on the final judgment." 507 U.S. at 634 (quotations omitted).

In addition to the basic difference between collateral review and direct review, the Court further noted "the State's interest in the finality of convictions that have survived direct review within the state court system." *Id.* at 635. The States are responsible, in the first instance, for defining and enforcing criminal laws; and in conducting criminal trials, the States are responsible, in the first instance, for vindicating constitutional rights. *Ibid.* Given the States' primary role in criminal adjudication, the Court recognized that "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Ibid.* (quotations omitted). The

Court has subsequently reiterated this same point on several occasions. *E.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991) (emphasizing the importance of respecting "the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights").

Based on these considerations, the Court held in *Brecht* that the *Chapman* standard—"harmless beyond a reasonable doubt"—was *not* appropriate for federal habeas review of state convictions. Instead, the Court asked whether the constitutional error in Brecht's case "had substantial and injurious effect or influence in determining the jury's verdict," and thus held that a federal habeas petitioner must prove "actual prejudice." 507 U.S. at 637 (quotations omitted).

In *Calderon* v. *Coleman*, the Court recognized yet another State interest warranting limited habeas review—the costs of retrials and resentencing. As this Court explained, "[t]he social costs of retrial or resentencing are significant, and the attendant difficulties are acute in cases * * * where the original sentencing hearing took place" many years earlier. 525 U.S. at 146. Accordingly, the Court concluded that "[t]he State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was *actually prejudiced* by the error." *Ibid.* (emphasis added).

The same considerations that drove the analyses in *Brecht* and *Calderon* suggest that state courts should be permitted to apply less stringent harmless-error standards in their own post-conviction proceedings. Although *Brecht* and *Calderon* did not arise from state proceedings, it is no less true here that (1) the purposes of direct review and collateral review are fundamentally different, (2) the States have an interest in the finality of judgments that have already survived direct review in their own courts, (3) state courts should be presumed to make good-faith attempts to vindicate constitutional rights at trial and

through the direct appeal process, and (4) the costs of resentencing are significant. This Court has already recognized the importance of these State interests, and the States should be free to take them into account when determining how their own courts should review final state-court judgments.

Moreover, the rationale for applying a relatively deferential standard on federal habeas review applies with even greater force to state habeas proceedings. Such proceedings are entirely creatures of state law and thus rest entirely on the authority of the State. And unlike federal habeas proceedings, state post-conviction proceedings fall outside this Court's general supervisory power.[5]

2. The principle that the States have wide discretion over State post-conviction proceedings is reflected in the wide variety of standards and procedures the States employ in determining whether post-conviction relief should be awarded. In some States, for example, relief is available by writ of habeas corpus; in others by remedies similar to the writ of coram nobis; and in others by application for statutory post-conviction relief. See generally Larry W. Yackle, *Postconviction Remedies* § 13 (1981 & Cum. Supp. 2006/2007) (describing the States' various post-

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[5] This is not to say that a federal court could apply any stricter standard on federal habeas review when a state court applies a harmless-error standard other than the federal standards. The question for the federal court is the same, namely, whether the state court's decision is "contrary to" or an "unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d). Because federal law does not provide the standard for harmless-error review in state court, a state court applying a state-created standard could not be faulted by a federal habeas court for applying that standard. *Cf. Carey* v. *Musladin*, 127 S. Ct. 649, 654 (2006) ("Given the lack of holdings from this Court" regarding a similar factual circumstance, the Court could not conclude that the state court's decision represented an unreasonable application of clearly established federal law).

conviction remedies).[6] Moreover, the substantive grounds for relief differ from State to State.[7]

Not surprisingly, the States also employ a variety of harmless-error standards. As shown in the Appendix, many States apply the federal *Chapman* standard as a matter of state law.[8] Other States apply the standard set

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[6] Compare, *e.g.*, Cal. Penal Code §§ 1473 *et seq.* (habeas corpus) with Mont. Code Ann. §§ 46-21-101 *et seq.* (coram nobis, tracking the Uniform Post-Conviction Procedure Act); Kan. Stat. Ann. §§ 60-1507 *et seq.* (coram nobis, tracking the federal motion to vacate sentence) and Ore. Rev. Stat. §§ 138.510 *et seq.* (other statutory post-conviction remedy).

[7] In Connecticut, for example, "a prisoner must demonstrate a miscarriage of justice or other prejudice and not merely an error which might entitle him to relief on appeal." *Lozada* v. *Warden*, 613 A.2d 818, 822 (Conn. 1992). In Illinois, a prisoner may petition for post-conviction relief on account of "a substantial denial" of his state or federal constitutional rights, or, in a capital case, newly discovered evidence "that establishes a substantial basis to believe that the defendant is actually innocent by clear and convincing evidence." 725 Ill. Comp. Stat. 5/122-1(a). And in New York, a prisoner may be entitled to relief for, among other things, the trial court's lack of jurisdiction; the prosecutor's knowingly offering false evidence; off-the-record prejudicial conduct; or newly discovered evidence. N.Y. Crim. Proc. Law § 440.10(1).

[8] See *Thompson* v. *State*, 2003 WL 22405385, at *2 (Alaska Ct. App. 2003); *State* v. *Corrales*, 676 P.2d 615, 627 (Ariz. 1983); *Howard* v. *State*, 2006 WL 1779506 (Ark. 2006); *Edwards* v. *People*, 129 P.3d 977, 988 (Colo. 2006); *State* v. *Castonguay*, 481 A.2d 56, 67 (Conn. 1984); *Haley* v. *United States*, 799 A.2d 1201, 1213-1214 (D.C. 2002); *Tuua* v. *State*, 2004 WL 944260, at *4 (Haw. Ct. App. 2004); *People* v. *Jimerson*, 652 N.E.2d 278, 287 (Ill. 1995); *Patton* v. *State*, 810 N.E.2d 690, 696-697 (Ind. 2004); *Morgan* v. *State*, 469 N.W.2d 419, 422 (Iowa 1991); *Taylor* v. *Commonwealth*, 175 S.W.3d 68, 72 (Ky. 2005); *Noble* v. *State*, 446 A.2d 844, 849 (Md. 1982); *Commonwealth* v. *Kartell*, 2005 WL 2739786, at *9 (Mass. Super. Ct. 2005); *Townsend* v. *State*, 646 N.W.2d 218, 223 (Minn. 2002); *Byrom* v. *State*, 927 So. 2d

forth in *Harrington* v. *California*, 395 U.S. 250, 254 (1969), under which an error will be deemed harmless if "overwhelming evidence" supports the defendant's guilt.[9] Still other States apply the *Brecht* standard, borrowed from federal habeas case law.[10]

But some States apply harmless-error standards in their post-conviction proceedings that differ from any of these federal standards. Some States have adopted by statute what amounts to a "plain error" standard, under which an error is deemed prejudicial only if it can be

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709, 730 (Miss. 2006); *State* v. *Whitfield*, 107 S.W.3d 253, 262 (Mo. 2003); *Bejarano* v. *State*, 146 P.3d 265, 268 (Nev. 2006); *State* v. *Forbes*, 119 P.3d 144, 146 (N.M. 2005); *State* v. *Zuniga*, 444 S.E.2d 443, 447 (N.C. 1994); *Hill* v. *State*, 615 N.W.2d 135, 141 (N.D. 2000); *Thomas* v. *State*, 241 N.E.2d 760, 763 (Ohio 1968); *Clayton* v. *State*, 892 P.2d 646, 653 (Okla. Crim. App. 1995); *Gibson* v. *State*, 586 S.E.2d 119, 122 (S.C. 2003); *Simon* v. *Virgin Islands*, 47 V.I. 3, 20 (V.I. Terr. Ct. 2002); *State* v. *Weed*, 666 N.W.2d 485, 495-496 (Wis. 2003); *Engberg* v. *Meyer*, 820 P.2d 70, 76 (Wyo. 1991).

[9] See *Breest* v. *Perrin*, 484 A.2d 1192, 1195 (N.H. 1984); *People* v. *Paige*, 801 N.Y.S.2d 240, 240 (N.Y. Sup. Ct. 2005); *Commonwealth* v. *Carter*, 861 A.2d. 957, 964 (Pa. Super. Ct. 2004); *Clark* v. *Ellerthorpe*, 552 A.2d 1186, 1188 (R.I. 1989).

[10] See *White* v. *State*, 729 So. 2d 909, 915 (Fla. 1999); *State* v. *Thomas*, 750 So. 2d 1114, 1126 (La. App. 1999); *Moeller* v. *Weber*, 689 N.W.2d 1, 12 (S.D. 2004); *Summers* v. *State*, 1999 WL 173977, at *5 (Tenn. Crim. App. 1999); *State* v. *Evans*, 114 P.3d 627, 636 (Wash. 2005). As the court in *Thomas* explained, "[a]pplications for post conviction relief or a writ of habeas corpus involving trial errors (not structural errors) must be decided by determining whether the error 'had substantial or injurious effect or influence in determining the jury's verdict,' not by using the harmless beyond a reasonable doubt standard of *Chapman* v. *California*, used in appeals." 750 So. 2d at 1126 (citations omitted).

shown to "affect substantial rights."[11] Other States apply a variety of other standards—such as Nebraska's "substantial miscarriage of justice" standard[12] or Alabama's "egregious error" standard.[13] And, as shown in the Ap-

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[11] See Ida. R. Crim. P. 61 (harmless error is "any error or defect in the proceeding which does not affect the substantial rights of the parties"); Kan. Stat. Ann. § 60-261 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); N.J. Ct. R. 1:7-5 ("Any error or omission which does not prejudice a substantial right shall be disregarded by the trial court before, during and after trial."); *In re Wilkinson*, 678 A.2d 1257, 1260-1261 (Vt. 1996) (in a post-conviction proceeding, error is harmless if it "does not affect the substantial rights of the parties").

[12] Neb. Rev. Stat. § 29-2308 ("No judgment shall be set aside, new trial granted, or judgment rendered in any criminal case * * * if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred"), cited in *State* v. *Nesbitt*, 650 N.W.2d 766, 795 (Neb. 2002).

[13] *Ex parte Powell*, 641 So. 2d 772, 775 (Ala. 1994) ("[P]ostconviction relief usually is available only on grounds involving egregious error, i.e., errors that are jurisdictional, constitutional, or otherwise fundamental").

For other standards, see *In re Harris*, 855 P.2d 391 (Cal. 1993) ("Only where the claimed constitutional error is both clear and fundamental, and strikes at the hear of the trial process, is an opportunity for a third chance at judicial review * * * justified"); Mich. Comp. Laws Ann. § 767.76 (no reversal unless "the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted"); *Sedler* v. *State*, 2004 ML 2523, at 12 (Mont. Dist. 2004) ("reasonable possibility" that the error "might have contributed to a conviction"); *State* v. *Davis*, 77 P.3d 1111, 1118 (Ore. 2003) ("Oregon's constitutional test for affirmance despite error consists of a single inquiry: Is there little likelihood that the particular error affected the verdict?"); *Loose* v. *State*, 135 P.3d 886, 890 (Utah App. 2006) ("An error is harmless when it is 'suffi-

pendix, a few States appear not to have adopted any particular standard.[14]

3. Because the Constitution does not "dictate[] the exact form" of state habeas proceedings (*Finley*, 481 U.S. at 559), and because the States are entitled to apply less stringent harmless-error standards on habeas review than on direct appeal, it follows that the Court of Criminal Appeals acted well within its authority when it applied Texas' own harmless-error standards—rather than federal standards—to the *Penry* error in this case.[15]

Under Texas' harmless-error standards, petitioner was required to prove that the *Penry* error "caused him such egregious harm that he did not have 'a fair and im-

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ciently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.'"); Va. Code Ann. § 8.01-678 (no reversal "[w]hen it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached").

[14] See *Shelton* v. *State*, 744 A.2d 465, 497 (Del. Super. Ct. 2000); 15 Me. Rev. Stat. § 2125; *Pueblo* v. *Torres Rivera*, 129 D.P.R. 331, 353 (P.R. 1991); *State ex rel. Corbin* v. *Haines*, 624 S.E.2d 752, 759 (W. Va. 2005).

[15] As Texas demonstrates (at 44-49), the decision below thus rests on an independent and adequate state ground, and for that reason the petition should be dismissed for want of jurisdiction. But even if the Court believes it has jurisdiction, it may wish to consider dismissing the petition as improvidently granted. The petition for certiorari is written as though this Court would ultimately decide whether the *Penry* error in this case was harmless as a matter of federal law. See Petition at i, 17-23. As we have shown, that assumption is false: The court below acted within its authority in applying the Texas harmless-error standard rather than any federal standard. Nevertheless, the States would benefit from a written opinion reaffirming their authority to apply their own harmless-error standards in their own post-conviction proceedings.

partial trial.'" 185 S.W.3d at 464. In other words, as this Court noted in *Brecht*, petitioner was required to show "actual prejudice." 507 U.S. at 637; accord *Calderon*, 525 U.S. at 146 ("the court must find that the defendant was actually prejudiced by the error").

This standard accomplishes the same purposes for the State of Texas that the "plain error" standard accomplishes for the United States. Under federal law, "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). This is a stricter standard than the standard applied to harmless error that is preserved at trial. See Fed. R. Crim. P. 52(a). Indeed, this Court has interpreted Rule 52(b) to mean that a "[c]ourt of [a]ppeals should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 736 (1993) (quotations omitted).

The *Almanza* standard that the Court of Criminal Appeals applied is similar. Where a party fails to object to a trial error—even a constitutional error—the "usual method" is to demand from the party claiming error a more compelling demonstration of prejudice. 185 S.W.3d at 463.[16] Had the court on direct appeal found an error, it would have applied this standard to determine whether reversal was appropriate. Because the court on habeas review is entitled to demand an even greater showing of prejudice from the prisoner, it was entirely appropriate for the court below to apply the *Almanza* rule here.

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[16] As Texas explains (at 23-24), the *Almanza* standard is even more favorable to the prisoner than the *Olano* standard, because a state court applying *Almanza* must grant relief if the prisoner makes the required showing of prejudice, whereas a federal court applying *Olano* has *discretion* to notice a plain error.

* * * * *

The Court of Criminal Appeals began its analysis with the assumption—based on this Court's decision in *Smith*—that the jury instructions given in this case violated *Penry*. Consistent with this Court's general rule that jury instruction errors are subject to harmless-error analysis, the court then asked whether the *Penry* error actually prejudiced petitioner. And consistent with settled harmless-error standards under Texas law, the court asked specifically whether the *Penry* error—to which petitioner did not object at trial—caused petitioner "such egregious harm that he did not have a fair and impartial trial." That approach is entirely consistent with the federal Constitution and with the States' authority to create and manage their own post-conviction proceedings in a manner that they believe will best serve the interests of all their citizens.

CONCLUSION

The decision below should be affirmed, or the petition dismissed.

Respectfully submitted.

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APPENDIX

APPENDIX

SUMMARY OF HARMLESS-ERROR STANDARDS IN STATE POST-CONVICTION PROCEEDINGS*

Chapman / Harmless Beyond a Reasonable Doubt	*Harrington* / Overwhelming Evidence Supports Verdict	*Brecht* / Substantial and Injurious Effect	Error Affects Substantial Rights	Other Deferential Standards	Undefined Standards
Alaska	New Hampshire	Florida	Idaho	Alabama	Delaware
Arizona	New York	Louisiana	Kansas	California	Georgia
Arkansas	Pennsylvania	South Dakota	New Jersey	Michigan	Maine
Colorado	Rhode Island	Tennessee	Vermont	Montana	Puerto Rico
Connecticut		Washington		Nebraska	West Virginia
District of Columbia				Oregon	
Hawaii				Texas	
Illinois				Utah	
Indiana				Virginia	
Iowa					
Kentucky					
Maryland					
Massachusetts					
Minnesota					
Mississippi					
Missouri					
Nevada					
New Mexico					
North Carolina					
North Dakota					
Ohio					
Oklahoma					
South Carolina					
Virgin Islands					
Wisconsin					
Wyoming					

* This summary shows the various standards that state courts have applied in post-conviction proceedings. Some States' courts may apply more than one of the harmless-error standards identified here.